SUPREME COURT OF THE UNITED STATES

KATHRINE MAE MCKEE *v.* WILLIAM H. COSBY, JR.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 17–1542 Decided February 19, 2019

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, concurring in the denial of certiorari.

In December 2014, petitioner Kathrine McKee publicly accused actor and comedian Bill Cosby of forcibly raping her some 40 years earlier. McKee contends that Cosby's attorney responded on his behalf by writing and leaking a defamatory letter. According to McKee, the letter deliberately distorts her personal background to "damage her reputation for truthfulness and honesty, and further to embarrass, harass, humiliate, intimidate, and shame" her. App. to Pet. for Cert. 93a. She alleges that excerpts of the letter were disseminated via the Internet and published by news outlets around the world.

McKee filed suit in federal court for defamation under state law, but her case was dismissed. Applying *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), and its progeny, the Court of Appeals concluded that, by disclosing her accusation to a reporter, McKee had "'thrust' herself to the 'forefront'" of the public controversy over "sexual assault allegations implicating Cosby" and was therefore a "limited-purpose public figure." 874 F. 3d 54, 61–62 (CA1 2017) (citing *Gertz* v. *Robert Welch*, *Inc.*, 418 U. S. 323, 345 (1974)). Under this Court's First Amendment precedents, public figures are barred from recovering damages for defamation unless they can show that the statement at issue was made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, *supra*, at

280. Like many plaintiffs subject to this "almost impossible" standard, McKee was unable to make that showing. See *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 771 (1985) (White, J., concurring in judgment).

McKee asks us to review her classification as a limited-purpose public figure. I agree with the Court's decision not to take up that factbound question. I write to explain why, in an appropriate case, we should reconsider the precedents that require courts to ask it in the first place.

New York Times and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law. Instead of simply applying the First Amendment as it was understood by the people who ratified it, the Court fashioned its own "'federal rule[s]'" by balancing the "competing values at stake in defamation suits." *Gertz*, *supra*, at 334, 348 (quoting *New York Times*, *supra*, at 279).

We should not continue to reflexively apply this policy-driven approach to the Constitution. Instead, we should carefully examine the original meaning of the First and Fourteenth Amendments. If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should we.

I

From the founding of the Nation until 1964, the law of defamation was "almost exclusively the business of state courts and legislatures." *Gertz*, *supra*, at 369–370 (White, J., dissenting). But beginning with *New York Times*, the Court "federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States." *Gertz*, *supra*, at 370. These decisions made little effort to ground their holdings in the original meaning of the Constitution.

A

New York Times involved a full-page advertisement soliciting support for the civil-rights movement and the legal defense of Dr. Martin Luther King, Jr. 376 U. S., at 256–257. The advertisement asserted that the movement was facing an "'unprecedented wave of terror by those who would deny and negate'" the protections of the Constitution. *Id.*, at 256. As an example, the advertisement claimed that "'truckloads of police'" in Montgomery, Alabama, "'armed with shotguns and tear-gas,'" had surrounded a college campus following a student demonstration. *Id.*, at 257. It further claimed that "'[w]hen the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.'" *Ibid.* The advertisement also stated that "'the Southern violators'" had "'answered Dr. King's peaceful protests with intimidation and violence,'" "'bombed his home almost killing his wife and child,'" "'assaulted his person,'" "'arrested him seven times,'" and "'charged him with "perjury."'" *Id.*, at 257–258.

The Times made no independent effort to confirm the truth of these claims, and they contained numerous inaccuracies. *Id.*, at 261.[1] The Times eventually retracted the advertisement. *Ibid.*

L. B. Sullivan served as Montgomery's commissioner of public affairs when the advertisement was published. *Id.*, at 256. Although none of the "Southern violators" was identified in the advertisement, Sullivan filed a libel suit

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[1] For example, the police did not "at any time" surround the campus when deployed near it; the dining hall "was not padlocked on any occasion"; the student protesters had not "refus[ed] to register" but rather "boycott[ed] classes on a single day"; "Dr. King had not been arrested seven times, but only four"; and the police "were not only not implicated in the bombings, but had made every effort to apprehend those who were." *New York Times*, 376 U. S., at 259.

alleging that the statements implicating Montgomery police officers were made "'of and concerning'" him because his responsibilities included supervising the police department. *Id.*, at 256, 262. A jury awarded Sullivan $500,000, and the Supreme Court of Alabama affirmed. *Id.*, at 256.

This Court reversed. *Id.*, at 264. It held that the evidence in the record was "incapable of supporting the jury's finding" that the false statements were made about Sullivan, who was not mentioned "by name or official position" in the advertisement. *Id.*, at 288. The advertisement was an "impersonal attack on governmental operations" and could not by "legal alchemy" be transformed into "a libel of an official responsible for those operations." *Id.*, at 292. This holding was sufficient to resolve the case.

But the Court also addressed "the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct." *Id.*, at 256. The Court took it upon itself "to define the proper accommodation between" two competing interests—"the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz*, 418 U. S., at 325 (majority opinion). It consulted a variety of materials to assist it in its analysis: "general proposition[s]" about the value of free speech and the inevitability of false statements, *New York Times*, 376 U. S., at 269–272, and n. 13; judicial decisions involving criminal contempt and official immunity, *id.*, at 272–273, 282–283; public responses to the Sedition Act of 1798, *id.*, at 273–277; comparisons of civil libel damages to criminal fines, *id.*, at 277–278; policy arguments against "self-censorship," *id.*, at 278–279; the "consensus of scholarly opinion," *id.*, at 280, n. 20; and state defamation laws, *id.*, at 280–282. These materials led the Court to promulgate a "federal rule" that "prohibits a public official from recov-